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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANGKHAN CHHIENG, Plaintiff and Appellant, v. DANNY CHU, Defendant and Respondent.	B228812 (Los Angeles County Super. Ct. No. BC406275)

APPEAL from a judgment of the Superior Court of Los Angeles, Malcolm H. Mackey, Judge. Affirmed.

Doniger/Burroughs, David R. Shein and Regina Y. Yeh for Plaintiff and Appellant.

Law Office of Bradley S. Sandler and Bradley S. Sandler for Defendant and Respondent.

In the underlying action, appellant Angkhan Chhieng asserted claims against respondent Danny Chu related to an Internet business, including breach of a partnership agreement. Following a bench trial, the court found no partnership agreement existed and entered judgment against Chhieng on his claims. Chhieng contends the court erred in ruling that an unsigned proposed contract between the parties could not be used to establish the existence of a partnership because it was a settlement offer (Evid. Code, § 1152).[1] We reject this contention and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In January 2009, Chhieng initiated the underlying action against Chu.[2] His first amended complaint, filed February 17, 2009, asserted claims for breach of contract, breach of fiduciary duty, fraud, constructive fraud, conversion, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and an accounting. Aside from Chu, the complaint named as defendants KushTV, Inc. (KushTV), Adconion Media, Inc. (Adconion), and Red Lever, Inc.

The complaint alleged the following facts: In 2005 and 2006, Chu and Chhieng formed a partnership to create KushTV, which was to disseminate media on the Internet. They orally agreed to act as general partners and to hold equal shares in KushTV, although Chu was responsible for locating funding and Chhieng was responsible for creating media. No shares in KushTV were issued to Chhieng, even though he participated fully in the business. Later, in selling KushTV to the other defendants, Chu wrongfully excluded Chhieng from the transaction.

Prior to the bench trial on Chhieng's complaint, Chu filed a motion in limine under section 1152 to bar evidence of his settlement discussions with Chhieng,

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1 All further statutory citations are to the Evidence Code.

2 Also plaintiffs in the action were Henry Chang and Robert Diaz. They are not parties to this appeal.

including a proposed contract that acknowledged the existence of a 2006 verbal agreement between the parties to share the proceeds from the sale of KushTV. The court deferred its ruling on the motion. During the trial, the court received the proposed contract into evidence, but found that it was a "settlement agreement" for purposes of section 1152, and thus was inadmissible to show the purported verbal partnership agreement. The court further concluded that Chhieng's claims failed for want of adequate evidence of a partnership. On June 29, 2010, judgment was entered in Chu's favor on Chhieng's claims.

DISCUSSION

Chhieng contends the trial court erred in ruling that under section 1152, the proposed contract was inadmissible to establish the verbal partnership agreement. As explained below, he is mistaken.[3]

A. *Governing Principles*

Section 1152 renders offers of compromise by a party, as well as "any conduct or statements made in negotiation thereof," inadmissible "to prove his or her liability for the loss or damage or any part of it." (§ 1152, subd. (a).)[4] The statute's scope is sufficiently broad to encompass the settlement of disputes arising

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[3] For the first time on appeal, Chhieng's reply brief asserts that the court made other errors, including applying contract law to a partnership and admitting evidence of Chhieng's prior drug convictions. Because he did not raise these contentions in his opening brief, they are forfeited. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp.769-771.)

[4] Subdivision (a) of section 1152 states: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it."

prior to any litigation. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 34-36 (*Caira*).) Furthermore, the statute encompasses settlement offers related to liability in tort (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1473 (*Zhou*)) and contract (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 13 (*C & K Engineering Contractors*), including contract-based liability regarding ownership of a business (*Caira, supra,* 126 Cal.App.4th at pp. 30-36). Although the statute bars the admission of settlement offers and related statements to establish liability, it does not preclude their admission for other purposes. (*Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 223.)

Under section 1152, the admission of a statement made in connection with an attempted settlement hinges on whether it is "truly independent" of the attempt. (*Caira, supra*, 126 Cal.App.4th at p. 36.) "[T]he rule which excludes offers of compromise does not apply to statements which are in nowise connected with any attempt of compromise or are statements of fact independent of an offer of compromise." (*Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal.App.3d 395, 402.) Whether the party's statement "amounts to an ordinary admission or constitutes an offer of compromise" is determined by the party's intent. (*Ibid.*) If the statement is not intended to be a concession, but an assertion of the party's own assessment of its entitlement or liability, "it is not an offer of compromise." (*Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1494.) In assessing intent, the trial court must give due consideration to "the strong policy in favor of promoting candor during settlement negotiations embodied in the statute." (*Caira, supra*, 126 Cal.App.4th at p. 36.)

Generally, the trial court's ruling under section 1152 is reviewed for an abuse of discretion. (*Zhou, supra,* 157 Cal.App.4th at p. 1476; *Caira, supra*, 126 Cal.App.4th at pp. 31-32.) Under this standard, we examine the court's findings for the existence of substantial evidence, insofar as the court relied on the findings

in exercising its discretion. (See *Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860; *Roddis v. All-Coverage Ins. Exchange* (1967) 250 Cal.App.2d 304, 309.) In this regard, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination [of the trier of fact]." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) However, to the extent the propriety of the court's ruling hinges on the correct interpretation of section 1152, we confront an issue of law that we resolve de novo.

B. *Underlying Proceedings*

Chu's motion in limine specifically targeted the proposed contract, which was entitled "Agreement."[5] The proposed contract contained recitals stating that in 2006, Chu and Chhieng entered into a verbal agreement that obligated Chu to give Chhieng a "certain portion" of the proceeds from the sale of KushTV, and that they intended the proposed contract to "memorialize their prior verbal agreement."[6]

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5 Chhieng has filed a motion to augment the record with a copy of the proposed contract. As "exhibits admitted in evidence . . . are deemed part of the record" (Cal. Rules of Court, rule 8.122(a)(3)), we grant the motion.

6 The recitals stated: "1. Chu is an officer and part owner of [KushTV] . . . . [¶] 2. Chhieng has been an employee of [KushTV] since its establishment. Although Chhieng has been compensated throughout his employment by [KushTV], on or about 2006, Chu, individually, and Chhieng entered into a verbal agreement wherein Chu agreed to give Chhieng a certain portion of those funds received by Chu in the event of a sale of [KushTV]. . . . However, notwithstanding such agreement, the parties never executed a writing regarding the aforementioned verbal agreement. [¶] 3. It is anticipated by the parties that [KushTV] will be sold in the future . . . . [T]he parties hereby wish to memorialize their previous verbal agreement . . . . It was, and remains, the intention of the parties that the prior verbal agreement, this Agreement, and the obligations as contained therein, shall be contingent upon the sale of [KushTV]. [¶] 4. Chu and Chhieng desire and intend to adopt this Agreement for the purpose of memorializing their prior

The proposed contract further stated that the recitals were themselves "a part of [the] Agreement." The proposed contract obliged the parties to "expressly and unequivocally acknowledge" the verbal agreement, and required Chu to pay Chhieng 15 percent of the proceeds from any sale (subject to adjustments not relevant here). Neither Chhieng nor Chu signed the proposed contract.

At trial, Chu maintained that Chhieng was never his business partner. According to Chu, in early 2005, he entered into a partnership with Henry Chang to create a business called "Kush Entertainment," which was dissolved shortly afterward.[7] Later, in February 2006, when Chu incorporated KushTV, a new business, he had no partners.[8] Chu owned 40,000 shares in KushTV, and the remaining shares were owned by a group of investors that did not include Chhieng. KushTV employed Chhieng as an independent contractor, pursuant to a written contract, to provide videos for KushTV's Web site.

In early 2008, while KushTV was encountering difficulties in raising investment funds, Adconion expressed an interest in buying KushTV. In August 2008, Chhieng asserted for the first time that he had an ownership interest in KushTV. He threatened to block the sale of KushTV to Adconion, file a suit to obtain shares in KushTV, and withhold consent for the presentation of his videos. Chhieng told Chu that he wanted 15 percent of the proceeds from KushTV's sale

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verbal agreement and providing the governing terms and conditions for such agreement. . . ."

[7] Regarding Kush Entertainment, Chu testified that in June 2005, when the business was incorporated, Chu and Chang held equal interests in the business. Later, after Chang was charged with drug dealing, the business's assets were seized, and Chu and Chang ended the business.

[8] Although Chhieng's complaint refers to this business as "KushTV, Inc.," Chu testified that the business incorporated in 2006 was called "KushTV.com, Inc." However, the parties do not dispute that the two names designate the same business entity.

to Adconion.

In an effort to protect the sale, Chu agreed to find an attorney to draft a document memorializing Chhieng's demands. In August 2008, Chu met with Chhieng and attorney Kent Seton, who had provided legal services to KushTV. According to Chu, Chhieng dictated most or all of the terms of the proposed contract to Seton. After the meeting, Seton drafted the proposed contract and sent it to Chu, who forwarded it to Chhieng. Chhieng replied that he wanted modifications to terms related to the payment of taxes regarding his share of the sales proceeds. Chu agreed to the modifications.

Chu intended to honor the proposed contract (as modified) to preserve the sale of KushTV, even though Chhieng's ownership claim regarding KushTV was not valid. He testified, "I needed to just get him out of my hair so [the] deal [could] close."[9] However, Chhieng never accepted the proposed contract. In October 2008, Chu sold KushTV to Adconion.

Chhieng testified that he was a founder of KushTV. According to Chhieng, in November 2004, he met with Chu and discussed the creation of a Web site offering materials attractive to 18- to 35-year-old males. Later, they entered into an oral partnership agreement to establish the Web site. Under their agreement, Chu's primary responsibility was to locate investors, and Chhieng's primary responsibility was to create content.

When Chu incorporated KushTV, he failed to identify Chhieng as a shareholder. Chu told Chhieng that naming him as an owner would "mess up [their] chances of getting money from venture capitalists," as Chhieng had a

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9 Chu acknowledged that during his deposition, he testified that he never intended to pay Chhieng any proceeds from the sale of KushTV. However, Chu maintained at trial that his deposition answers related solely to Chhieng's claim to own 50 percent of KushTV, which Chhieng had asserted in the underlying action.

criminal record. When Chhieng later sought a written partnership contract, Chu said that preparing the contract would consume funds needed for the business.

In August 2008, at Chhieng's request, Chu and Chhieng met with attorney Seton, who prepared the proposed contract. Chhieng denied that he dictated the terms of the contract to Seton. According to Chhieng, Chu told Seton that he and Chhieng were partners and were finally putting their agreement "on paper." However, Chhieng rejected the contract when it was sent to him because it failed to reflect that he owned 50 percent of the business.

Although the proposed contract was received into evidence, the trial court ruled that it was inadmissible under section 1152 to show the purported verbal partnership agreement. Noting that the proposed contract concerned only 15 percent of the sales proceeds from KushTV, the court stated: "It's a settlement agreement. . . . They [were] trying to settle the case, and that was it, and it fell through." The court further found that Chu's testimony was "very credible," and Chhieng's testimony was not credible.

C. *Analysis*

We see no error in the court's ruling under Evidence Code section 1152. As originally enacted, the statutory predecessor of this provision barred only the admission of "offer[s] of compromise" (former Code of Civil Procedure section 2078, repealed Stats. 1965, ch. 299, § 2, pp. 1337, 1366). In *People ex rel. Dept. Public Works v. Forster* (1962) 58 Cal.2d 257, 265 (*Forster*), our Supreme Court explained the application of section 1152's predecessor in the following terms: "'It is often difficult to determine in a particular case what amounts to an ordinary admission and what constitutes an offer of compromise. . . . If the proposal is tentative, and any statements made in connection with it hypothetical, if the offer was made to "buy peace" and in contemplation of mutual concessions, it is as to

such point a mere offer of compromise. On the other hand, if the intention is apparent to admit liability and to seek to buy or secure relief against a liability recognized as such, or if the party making the proposal apparently intended to make no concession but to exact all that he deemed himself entitled to, the proposal is an ordinary admission against interest and not an attempt to compromise.'" (Quoting 31 C.J.S.[, Evidence], §285, pp. 1042-1043, italics omitted.)

In enacting section 1152, the Legislature changed the rule in *Forster*, which "place[d] a premium on the form of the statement," to promote "the complete candor between the parties that is most conducive to settlement." (Cal. Law Revision Com. com., 29B Pt. 3B West's Ann. Evid. Code (2009 ed.) foll. § 1152, pp. 456-457.) The significance of the change was expressly acknowledged by the Supreme Court in *C & K Engineering Contractors.* There, over the defendant's objection, the trial court excluded evidence that during settlement discussions, the plaintiff's agent had described a particular phone call in a manner that undercut the factual basis for the plaintiff's claims. (*C & K Engineering Contractors*, *supra*, 23 Cal.3d at p. 13.) Noting the Legislature's intent to change the *Forster* rule to promote candor in settlement discussions, the Supreme Court held that section 1152 barred the admission of the statements, as they had occurred "during compromise negotiations in which both parties were discussing, and attempting to discover, the facts underlying their dispute." (*Ibid*.)

Here, there is ample evidence that the recitals and terms of the proposed contract referring to a 2006 verbal agreement were elements of an effort to settle the dispute between Chu and Chhieng, rather than "truly independent" factual statements. (*Caira*, *supra*, 126 Cal.App.4th at p. 36.) To begin, the proposed contract makes no reference to a partnership agreement between Chu and Chhieng giving them equal interests in KushTV. As the trial court noted, the proposed

contract refers only to a 2006 verbal agreement regarding 15 percent -- rather than 50 percent -- of the sales proceeds regarding KushTV. The document thus discloses no admission by Chu regarding the existence of a "50/50" partnership agreement. Furthermore, Chu testified that he was prepared to accept the agreement solely to protect the sale of KushTV, as Chhieng had no ownership interest in KushTV. This evidence supports the reasonable conclusion that the recitals and terms in the proposed contract referring to a 2006 verbal agreement were merely Chu's concessions in aid of a settlement, and were thus intended only to """"buy peace"""" for him. (*Forster*, *supra*, 58 Cal.2d at p. 265.)

Chhieng contends that there was insufficient evidence to support the trial court's determination that the proposed contract was a settlement agreement. He argues that the proposed contract does not characterize itself as a settlement document and that the parties never described it as such to Seton; in addition, he urges us to reject Chu's trial testimony as not credible.

The absence of the word "settlement" from the proposed contract and the parties' discussions with Seton does not render section 1152 inapplicable to the proposed contract. A document omitting the word may nonetheless be inadmissible under section 1152 when the surrounding circumstances establish that it was an element of an effort to settle a dispute. (See *Caira*, *supra*, 126 Cal.App.4th at p. 34 [e-mail containing no reference to settlement was inadmissible under section 1152 because it was aimed at resolving dispute].)

Chhieng's remaining contention regarding the credibility of Chu's testimony misapprehends our role as an appellate court. Upon review for substantial evidence, we do not reweigh the evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1650.) Moreover, on such review, "'[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the

credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" (*Daly v. Wallace* (1965) 234 Cal.App.2d 689, 692, italics omitted, quoting *People v. Huston* (1943) 21 Cal.2d 690, 693, overruled on another ground in *People v. Burton* (1961) 55 Cal.2d 328, 352.)

As our Supreme Court explained in *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878, even internally inconsistent testimony from a single witness may support a judgment. "It is for the trier of fact to consider internal inconsistencies in testimony, to resolve them if this is possible, and to determine what weight should be given to such testimony." (*Ibid*.) Furthermore, "[t]he testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) We reject the statements of a witness that the factfinder has believed only if they are "'inherently improbable,'" that is, "physically impossible or obviously false without resorting to inference or deduction." (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293; see *Daly v. Wallace*, *supra*, 234 Cal.App.2d at p. 692.) This is not the case regarding Chu's testimony.[10]

Chhieng also contends the proposed contract falls within an exception stated in subdivision (c)(2) of section 1152, which provides that the statute does not bar evidence of "[a] debtor's payment or promise to pay all or a part of his or her

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10 In a related contention, Chhieng maintains that the proposed contract was not properly excluded under section 1152, even if it was ostensibly a settlement document, because Chu testified in his deposition that he did not intend to pay funds from the sale of KushTV (see fn. 9, *ante*). Chhieng thus maintains that Chu was not genuinely engaged in settlement negotiations. This contention also fails under the principles explained above, as Chu testified at trial that he always intended to comply with the proposed contract, and that his deposition testimony was directed at Chhieng's claim to own 50 percent of KushTV. In view of Chu's testimony at trial, the court reasonably determined that the proposed contract was not independent of an attempt to settle the parties' dispute.

preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty." This contention fails in light of the plain language of the exception, which limits its scope to evidence of "a new duty" or "a *revival* of [a] preexisting duty."[11] (*Ibid.*, italics added.) Chhieng never offered the proposed contract to show that Chu subjected himself to a new or revived duty during the settlement discussions. Indeed, as the proposed contract was never executed, it was incapable of creating a new duty or reviving a preexisting duty. Rather, Chhieng sought to admit the proposed contract *solely* to show the pertinent "preexisting duty," which falls outside the exception.

Our conclusion finds additional support from the close resemblance between subdivision (c)(2) of Evidence Code section 1152 and an exception to rule 309 of the Model Code of Evidence, which is the Model Code's counterpart to Evidence Code section 1152. The exception to rule 309 states: "Evidence of a debtor's promise to pay all or part of his preexisting debt is admissible as tending to prove the creation of a new duty on his part, or a revival of his preexisting duty, to pay all or part of the debt." Regarding the exception, the comments to rule 309 explain: "If a promise creates in the promisor a legal duty to perform the promise, and the action is for damage for breach of *that* duty, evidence of the promise is not excluded by this Rule. Thus in an action for breach of a contract to compromise a claim for damage, evidence of the alleged offer to compromise and its alleged acceptance is admissible. It is *only* where evidence of the promise, whether legally enforceable or not, *is offered as tending to prove the promisor's liability for the original damage that the Rule comes into play*. Because a debtor's promise to pay

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11 As no published decision has construed this exception, we confront an question of statutory interpretation. We thus seek the legislative intent underlying the exception, looking first to the ordinary meaning of its language. **(***Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1386, 1387.)

all or part of his debt, made after the statutory period for bringing an action thereon has expired, is said by some courts to reestablish his liability for failure to meet his original obligation, [the exception] is necessary." (Italics added.) Accordingly, the exception in subdivision (c)(2) of Evidence Code section 1152 is inapplicable to the proposed contract, as Chhieng offered it solely to establish the verbal partnership agreement. In sum, we see no error in the trial court's ruling under Evidence Code section 1152.

DISPOSITION

The judgment is affirmed. Chu is awarded his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.